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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's refusal to recognize the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction violates the Full Faith and Credit Clause of the Constitution.

2. In a death case where the principal aggravating circumstance relied on at sentencing was a 20-year-old out-of-state conviction, does the subsequent invalidation of that conviction--when there was no other evidence to support that aggravating circumstance -- require petitioner to be resentenced?

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NO. 87-5468

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

This matter is before the Court on the Petition of Samuel Bice Johnson for a Writ of Certiorari to the Supreme Court of the State of Mississippi wherein the Court denied petitioner post-conviction relief from his sentence of death.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is reported as Johnson v. State, 511 So.2d 1333 (Miss. 1987). A copy of the

opinion is set out as an exhibit to the Petition for Writ of Certiorari in this case.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3) challenging the constitutionality of his sentence of death.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional and statutory provisions involved and set them forth in an appendix to his brief.

STATEMENT OF THE CASE

A. Substantive Facts:

On December 31, 1981, petitioner Samuel Johnson, Charles Montgomery, Otis Lee Fairley and Anthony Fields left New Orleans, Louisiana, headed for Collins, Mississippi. They were traveling in Johnson's yellow Ford

LTD automobile. They stopped briefly to visit some of Fairley's relatives in Purvis, Mississippi. When they were approaching Collins they were stopped by Mississippi Highway Patrolman Billy Langham for speeding. Langham asked Johnson to produce a driver's license. Johnson had none. Langham then asked Johnson to get out of the car. Johnson complied. When Johnson got out of the car Langham saw a butcher knife on the front seat next to the spot where ohnson had been sitting. He asked Johnson to move to the rear of the car. Langham then placed the butcher knife on top of his patrol car. He went back to the LTD and told the rest of the occupants of the car he was going to search them. He did so one-by-one, sending them to stand near the patrol car as he finished searching each one. He then proceeded to search the LTD.

While he was searching the car Fairley walked to the patrol car, got the butcher knife and gave it to Johnson. Johnson slowly walked back to his car and stabbed Langham in the back as he was searching the back seat of the LTD.

Langham went for his gun. Johnson also went for Langham's gun. They struggled, and Johnson called to Fairley for assistance when Langham proved to be to much for him to handle alone. Johnson and Fairley then struggled with Langham. Johnson yelled to Montgomery and told him to get Langham's gun. When Montgomery secured the gun he yelled to the others that he had the gun. Johnson and Fairley broke free of Langham and went for the car. Montgomery held the gun on Langham. Montgomery started to get in the car and Johnson said "No,

shoot the motherfucker." Montgomery hesitated and Johnson told him again to shoot the officer. Montgomery shot and killed Langham. He then got in the car and threw the gun out as they sped away. During the time this assault on the officer was taking place cars were passing and observing the fight. Some even stopped to render assistance.

The four men abandoned the yellow LTD a short time later and stole a yellow Mercury Comet to cover their escape. They were finally stopped by law enforcement officers shooting out the tires of the car when they attempted to run through a police roadblock.

B. Procedural History

Petitioner appears before this Court as a result of the denial of post-conviction relief by the Mississippi Supreme Court. The conviction and resulting death sentence he is challenging were returned in the

Circuit Court of Pike County, Mississippi. The Pike County trial was conducted pursuant to an indictment returned by the grand jury of Covington County, Mississippi for the capital murder of Highway Patrolman Billy Langham in the course of his duty as a peace officer. Miss. Code Ann. § 97-3-19 (2) (a). Venue was changed to Pike County, Mississippi, on motion of petitioner. Petitioner's bifurcated trial was conducted pursuant to Miss. Code Ann. § 99-19-101 et seq. At the conclusion of the sentencing phase of the trial the jury returned a sentencing verdict of death, finding three aggravating circumstances and holding that they outweighed any mitigating circumstances. These aggravating circumstances were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use of threat of violence to the person.

> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.
>
> Tr. 2294; 511 So.2d at 1337.

On automatic direct appeal to the court below petitioner raised twenty-two separate claims of error. After briefing and argument, on May 8, 1985 the Mississippi Supreme Court affirmed, by written opinion, petitioner's conviction and death sentence. A petition for rehearing was denied on November 6, 1985. Johnson v. State, 477 So.2d 196 (Miss. 1985). Petitioner then filed a petition for writ of certiorari with this Court. After consideration this petition was denied. Johnson v. Mississippi, ____ U.S. ____, 106 S.Ct. 1958 (1986). A petition for rehearing was filed and denied in due course. Johnson v.

Mississippi, ____ U.S. ____, 106 S.Ct. 2930 (1986).

Upon the denial of certiorari from direct appeal petitioner then filed a petition to vacate his conviction and sentence under the state post-conviction collateral relief act. Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1984). During the pendency of this petition, petitioner applied to the courts of the State of New York to vacate his 1963 conviction for assault with intent to rape in that state. The trial court denied relief as did the intermediate court of appeals. See: People v. Johnson, 126 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986). However the New York Court of Appeals reversed the lower courts and granted petitioner relief. People v. Johnson, 69 N.Y. 339, 506 N.E.2d 1117, 514 N.Y.S.2d 324 (1987).

Petitioner then made this fact known to the Mississippi Supreme Court. In due course the court below rendered its decision which is reported as Johnson v. State, 511 So.2d 1333 (Miss. 1987). Petitioner then filed a petition for writ of certiorari with this Court which was granted limited to questions 1 and 2. Johnson v. Mississippi, __U.S.___, 98 L.Ed.2d 646 (1988).

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court recognized that the New York Court of Appeals had vacated petitioner's 1963 conviction for assault with intent to rape. The fact that the Mississippi Supreme Court did not vacate the death sentence imposed by a jury in Mississippi based on this vacature did not indicate that the Court was not affording the actions of the New York court full faith and credit as required by the Constitution.

It simply means that the vacation of this conviction was not sufficient under Mississippi law to vitiate the death sentence.

The clear precedent from this Court and the state court is that the invalidity of one of several aggravating circumstances found to support a death sentence does not invalidate a death sentence. Where the jury found that three aggravating circumstances existed beyond a reasonable doubt, only one has failed. The Court below, as required by statute, made a proportionality review of the sentence with those entered in like cases considering both the defendant and the crime. In making this review the Court did not rely upon the now vacated New York conviction. There is no indication that the sentence entered in this case was arbitrary or freakish as forbidden by the Eighth Amendment.

The procedural bar imposed by the Mississippi Supreme Court was valid and announced at the time of petitioner's direct appeal. This bar is based on the failure of petitioner to timely attack his New York conviction after the imposition of the death sentence in Mississippi. At trial and on direct appeal he raised no claim of its invalidity although the legal foundation of such a claim existed at the time. His inaction and delay of four years in attacking his New York conviction is an adequate and independent state law ground for imposing a procedural bar to his untimely raising of the issue.

ARGUMENT

1. Mississippi Supreme Court afforded the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction full faith and credit.

Article IV, Section I of the Constitution reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

Petitioner claims that the Mississippi Supreme Court violated the "full faith and credit" clause of this constitutional provision when it refused to vacate the 1982 Mississippi death sentence which relied in part on a 1963 assault with intent to rape conviction from New York when the New York Court of Appeals, in 1987, vacated that conviction. However, the question here is not whether the Mississippi Supreme Court recognized the judgment of the State of New York as it clearly did. The question we must address is whether the action taken in response to this vacature of petitioner's 1963 conviction was sufficient under the "full faith and credit" clause. Respondent

would contend that, under the facts and circumstances of this case, it was.

The Mississippi Supreme Court in deciding this post-conviction motion recognized that the New York Court of Appeals had vacated the 1963 conviction for assault with intent to rape. The court stated:

> In this petition, for the first time, Johnson argues that the 1963 conviction was invalid. Apparently, following or commensurate with its filing, Johnson's counsel also took steps to have this conviction vacated by the New York courts. This Court has been furnished with a copy of an order and slip opinion of the Court of Appeals of New york, dated March 24, 1987, in which that court did indeed reverse and vacate this 1963 conviction and dismiss the indictment.
>
> The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York.

511 So.2d at 1339.

The clear indication is that Mississippi Supreme Court recognized the fact that New York had vacated the 1963 conviction.

In considering whether or not the vacation of the New York conviction warranted vacation of the death sentence in Mississippi the Mississippi Supreme stated:

> As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process Zant v. Stephens, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. Johnson v. State, 477 So.2d at 219.
>
> We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. Johnson v. State, 477 So.2d at 219. Nevertheless we reject New York's setting aside of the 1963 conviction as a basis to vacate the verdict of the jury.

Respondent would submit that petitioner and amici are wrong when they contend that

giving "full faith and credit" to the vacature of the New York conviction is synonymous with vacating the death sentence in Mississippi. Petitioner relies on the cases involving the reduction of enhanced sentences when the conviction used to enhance the sentence is vacated by another state. While it is true that in most states, as in Mississippi [(See Phillips v. State, 421 So.2d 476 (Miss. 1982)], the vacation of a conviction used to enhance a sentence pursuant to an habitual offender statute, requires a resentencing without the vacated sentence. That is not the case here. As the court pointed out in the case at bar, proof of the required prior convictions under Mississippi's habitual sentencing scheme automatically results in the maximum authorized sentence. The capital sentencing scheme does not operate in that manner. Where the habitual

sentencing hearing is held before a trial judge alone, capital sentencing is required to be held before for a jury. Miss. Code Ann. §99-19-101(1), (Supp. 1977). In an habitual sentencing proceeding there is only one thing that can enhance the sentence, that is the existence of certain prior convictions. In a Mississippi capital proceeding, one has first to be indicted for one of seven narrowly defined capital offenses and found guilty of that offense. The jury is then required to find beyond a reasonable doubt the existence of at least one of the eight statutory aggravating circumstances. The jury must determine whether the aggravating circumstances outweigh the mitigating circumstances and then determine if the sentence of death is appropriate. There is no requirement that the jury return a sentence of death. After a sentence of death is returned there is an

automatic appeal where the supreme court is required to determine whether the sentence is arbitrary or disproportionate. Miss. Code Ann. §99-19-105(3). It is evident that the use of a prior conviction in the capital sentencing scheme is only remotely similar to it use in the habitual offender enhanced punishment scheme. The Mississippi Supreme Court decided that it was not necessary to vacate the death sentence because of the actions of the New York court.

We submit that the actions of the Mississippi court were sufficient to pass muster under the "full faith and credit" clause. However, even if it were found that the Mississippi Supreme Court did not extend full faith and credit to the actions of the New York court it matters not. Even if the court below had held that it would not recognize the New York vacature, which it

did not, the outcome below would have been the same. The Mississippi court held that the vacation of the sentence was not sufficient to change the outcome of the sentencing proceeding in Mississippi.

We would state that this is not a refusal to grant full faith and credit to the New York judgment, but is only a state law interpretation of the effect of such a vacature on a death sentence in Mississippi.

> 2. Where one of three aggravating circumstance relied on at sentencing was subsequently invalidated, there is no requirement that petitioner be resentenced.

Respondent would submit that there is no requirement that the subsequent invalidation of one of three aggravating circumstances found by a jury to support a death sentence mandates the vacation of that death sentence. There are several reasons that this is not so under the particular circumstances of this case.

First, under this Court's holding in Lowenfield v. Phelps, 484 U.S. ____, 98 L.Ed.2d 568, 108 S.Ct. ____ (1988), the function of aggravating circumstances is different under different statutory schemes. The Court stated:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offense, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, 77 L.Ed.2d 235, 103 S.Ct. 2733, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to

kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that aggravating circumstance duplicated one of the elements of the crime does not make the sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

98 L.Ed.2d at 582-83.

For the purposes of this analysis, the Mississippi capital punishment scheme is no different than that in Louisiana. Section 97-3-19, Miss. Code Ann. (Supp. 1983), defines murder and capital murder.[1] In Mississippi the definition of capital murder serves the same purpose as it does in Texas

[1] Murder and capital murder are defined in section 97-3-19 (Supp. 1983) as:

and Louisiana. As can be seen from a reading of this statute, capital murder is limited to seven types of murders. Therefore under the rationale of Lowenfield, the aggravating circumstance that the jury

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
>
> (a) When done with deliberate design to effect the death of the person killed, or of any human being;
>
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although with any premeditated design to effect the death of any particular individual; (c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit such felonies.

is required to find, under state law, during the sentencing phase of a capital trial has

---

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. . . . (Definition of peace officer omitted);
>
> (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
>
> (c) Murder which is perpetrated by use or detonation of a bomb or explosive device;
>
> (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

no constitutional significance in the constitutionally required narrowing

---

> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;
>
> (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit any such felony;
>
> (g) Murder which is perpetuated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

Subsection (f) and the two unnatural intercourse parts of subsection (e) were not part of the statute at the time petitioner committed his crime.

process. As does Louisiana's scheme, the Mississippi scheme "narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion." 98 L.Ed.2d at 582.

The Fifth Circuit Court of Appeals, in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), spoke to the constitutional significance of aggravating circumstances in Mississippi. The Fifth Circuit stated:

> The definition of capital murder in Mississippi serves the same narrowing function as the parallel aggravating circumstance would in Georgia.
>
> In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in Jurek, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a

statutory aggravating circumstance before the death penalty may be imposed." 428 U.S. at 270, 96 S.Ct. at 2955. As this court stated in Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986)

> By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances.
>
> The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court. Compare Miss. Code Ann. § 99-19-105(3)(c) (Supp. 1985) with Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 878, 79 L.Ed.2d29 (1984). See Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3429, 77 L.Ed.2d 1134 (1983) (plurality opinion); Stephens, 462 U.S. at 879-80, 103 S.Ct. at 2743. Thus, the Mississippi death penalty statute satisfies constitutional requirement despite the broad construction placed on the especially heinous aggravating

circumstance by the Mississippi Supreme Court.

We do not base this decision on the harmless error doctrine of Stephens, 462 U.S. at 884-91, 103 S.Ct. at 2746-50. See Barclay, 463 U.S. at 951 n.8, 103 S.Ct. at 3425 n. 8. Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error. If the change in construction is an error at all, it is an error of state law that is not cognizable on habeas review. Harris, 104 S.Ct. at 875; Barclay, 463 U.S. at 957-58, 103 S.Ct. at 3428-29. [Footnotes omitted.]

806 F.2d at 1248-49.

Seemingly, the only conclusion that can be reached after a reading of the opinions in Lowenfield and Johnson, is that under the Mississippi scheme, aggravating circumstances are not required by the Federal Constitution. They are only a further, state law imposed, hurdle that must be crossed in the process to select those eligible to receive the death penalty. If

they are not required under the federal constitution then the interpretation and application of these circumstances, are for the most part, a matter of state law. Here, the Mississippi Supreme Court considered the effect of the vacation of the New York conviction on the death sentence given in Mississippi and found this not to require vacation of the death sentence. Hence, under Mississippi's double narrowing scheme the statutory aggravating circumstances do not take on a federal constitutional significance.

As required by the Section 99-19-105, Miss. Code Ann. (Supp. 1985) the Mississippi Supreme Court reviewed the sentence of death on automatic appeal when it was imposed. Under the dictate of Section 99-19-105(3), the court must determine:

> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This type appellate review was underscored in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 27733, 77 L.Ed.2d 235 (1983). See: Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984), cert. denied, ____U.S.____, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984) In Zant the Court stated:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept the court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious. 250 G., at 101, 297 SE2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." Ibid. As we noted in Gregg, 428 U.S. at 204-205, 49 L.Ed.2d 859, 96 S.Ct. 2909, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.
>
> [Emphasis added.] 77 L.Ed.2d at 258.

The importance of the appellate review to a capital punishment scheme was again discussed in Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), this time in the context of a balancing scheme. The Court held:

> In this case, as in Zant, supra, at 890, 77 L.Ed.2d 235, 103 S.Ct. 2733, our decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great."
>
> 77 L.Ed.2d at 1149.

While the Court noted that no mitigating circumstances existed in Barclay, such fact clearly was not necessary to the decision. This was demonstrated later in Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), where the Court again considered the effect of an improper aggravating circumstance in the balancing process, this time where mitigating circumstances were present. In Goode the Court held:

> The critical question "is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." Id., at 956, 77 L.Ed.2d 1134, 103 S.Ct. 3418.
>
> We have great difficulty concluding that the balancing process was so infected. A properly instructed jury recommended a death sentence. On direct appeal to the Florida Supreme Court, the court stated that "[c]omparing the aggravating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." Goode v. State, 365 So.2d at 384-385. Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.
>
> [Emphasis added.] 78 L.Ed.2d at 193-194.

As stated above the court below, by state statute and its own opinion, is required to review the sentence for arbitrariness and to assure proportionality. This required review was made in this case on direct appeal. The court held:

> Under the facts of this case, the jury was warranted in believing Johnson an active participant, if indeed not the leader, in a deliberate, brutal slaying of a peace officer carrying out his duties. In the absence of the abolition of the death penalty, no appellate court is justified in holding that the jury having found Johnson guilty, could

not also return a death penalty verdict under these facts.

The very word "murder" embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious.

Civilized society must place its dependence on peace officers. They preserve the peace, protect us from harm and pursue the wrongdoer. They are the front line infantry in society's eternal struggle with crime.

The murder of a police officer in the line of duty must be equated with treason or espionage in time of war. Such a crime warrants the most severe punishment society exacts.[3]

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[3] It follows this case is not disproportionate to the sentence imposed in other capital murder cases.

477 So.2d at 217.

This finding by the Mississippi Supreme Court that the sentence was not arbitrary or disproportionate to that imposed in other cases would satisfy Goode, Barclay, and Zant, even if the Mississippi statute were

like the Georgia or Florida statutes in its application. However, as we have pointed out, the Mississippi statute is like the Louisiana statute in its application, where aggravating circumstances do not play a constitutionally required narrowing role in Mississippi.

It is clear from reading the excerpt from the opinion on direct appeal quoted above that the court below, when reviewing whether or not the sentence was disproportionate, did not consider the prior New York conviction in its review. 477 So.2d at 217. While the court below did find that the prior conviction aggravating circumstance was supported by the record (477 So.2d 219), there is no mention of the prior conviction in considering whether or not the sentence was disproportionate to the crime or other sentences. It cannot be said, in light of the findings on appeal by the Mississippi Supreme Court, that the

jury's consideration of this later vacated conviction forms a sound basis for concluding that the sentence is arbitrary or freakish. 78 L.Ed.2d at 194.

Clearly the evidence of the New York conviction was admissible at the time of the trial in this case. At the time of his trial the prior conviction was undisturbed, and as stated in Zant there is "[n]othing in the United States Constitution that prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination . . ." 77 L.Ed.2d at 257. On direct appeal the Mississippi Supreme Court found that consideration of a prior felony conviction, as an aggravating circumstance, was not prohibited by the Federal Constitution, citing Zant, California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171

(1983); and Gregg v. Georgia, 428 U.S. 153, 95 S.Ct. 2909, 49 L.Ed.2d 859 (1976). 477 So.2d at 218. Further the court below found that the remoteness in time of the conviction did not invalidate its consideration. However, petitioner obtained an instruction on and was allowed to argue to the jury as a mitigating factor the remoteness in time of the conviction. 477 So.2d at 219. It is clear that at the time of his Mississippi conviction and sentence of death petitioner did not consider the New York conviction invalid. The court also found the other aggravating circumstances returned by the jury were proper and as later stated in the post-conviction review opinion, "would carry greater weight than the New York conviction in determining Johnson's sentence." 511 So.2d at 1338.

It is also significant to point out that under the rulings of the Mississippi

Supreme Court there is no limitation on the consideration of mitigating circumstances. See: Davis v. State, 512 So.2d 1291 (Miss. 1987), cert. den. sub nom, Mississippi v. Davis, ___ U.S.___, 56 U.S.L.W. 3591 (1988) (Held reversible error to deny defense attempt to introduce as mitigating circumstance that Davis had a prior conviction for assault that resulted in prison sentence). This is in total compliance with the rulings found in Hitchcock v. Duggar, __ U.S.__, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In this case the jury was instructed that they could consider as mitigating:

1) Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against the imposition of the death penalty.

2) Samuel Johnson's ability to adjust well to prison life without violence.

3) The defendant did not fire the gun.

4) Samuel Johnson has shown no incidents of violence in past stays in prison.

5) Samuel Johnson's only previous conviction of a felony involving the use or threat of violence to the person of another was over 19 years ago on April 9, 1963.

6) Any and all other matters, facts, and circumstances which you as jurors may consider from the evidence as mitigating.

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From this list there can be no contention that the consideration of mitigating evidence was in any way limited. This is in line with the concern with mitigating circumstances in Lowenfield, when considering statutes where the finding of aggravating circumstances are not constitutionally required. 98 L.Ed.2d at 583.

Here the Mississippi Supreme Court, in its post-conviction opinion, recognized the vacation of the 1963 New York conviction and then considered the effect of this vacature on the death sentence imposed in Mississippi. Although the Mississippi Supreme questioned the reasoning behind and the actual procedures used in vacating the New York conviction, this is not pertinent to this inquiry. The court held that under state law this vacature did not require the setting aside of the verdict of death. The quibbling by amicus whether this vacature was achieved by direct appeal or a post-conviction collateral proceedings does not change the effect of the ruling. This process was begun by the filing of a post-conviction motion to obtain an out of time appeal and is not the type of direct appeal contemplated by the Mississippi Supreme Court in its opinion.

In Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), aff'd 464 U.S. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983), the Fifth Circuit considered whether the Louisiana Supreme Court's failure to consider the validity of all the aggravating circumstances found violated the constitution. The court held:

> The aggravating circumstance of armed robbery-murder was present and unanimously found by the jury. Under Louisiana law this means that the two questioned aggravating circumstances are not necessary to entitle the jury to consider imposition of the death penalty. The extra findings went to the gravity of his crime, not the jury's power to impose the death penalty.
>
> Since the requisite one aggravating circumstance of murder in the course of an armed robbery is clearly present and was unanimously found by the jury, the other two circumstances are only material to deciding whether the aggravating and mitigating circumstances weighted together indicate the death penalty should be imposed. Here, the thing of significance is how the jurors perceived the weight of these actions by petitioner. The weight they

> assigned in determining whether the petitioner's acts were or were not outweighed by mitigating circumstances [sic] necessarily be ested [sic] by how they viewed the fact they properly knew. The jury necessarily focused on what Williams had done, not on how Louisiana classified his actions, since they were not instructed on the legal meaning of the terms involved.
>
> . . .
>
> This speculation is beside the mark, however, because the meaningful portions of this verdict, (1) that at least one aggravating circumstance was present and (2) that under the totality of aggravating and mitigating circumstances the death penalty should be imposed, were the product of channeled discretion and are rationally reviewable.
>
> . . .
>
> Irregardless [sic] of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one may properly serve as the basis for appellate affirmation of the death sentence.
>
> 679 F.2d at 389-90.

As pointed out in Williams, the speculation as to what effect the validity or invalidity of an aggravating circumstance has on the

weighing process misses the mark. The thing that must be viewed is whether or not at least one of the aggravating circumstances was found beyond a reasonable doubt and whether the finding, under the totality of the aggravating and mitigating circumstances that the death penalty should be imposed, was the product of channeled discretion and is rationally reviewable. We would submit that the decision to impose death in this case was the product of channeled discretion and that decision was and is rationally reviewable even after the vacation of the 1963 New York conviction. In Knighton v. Maggio, the Fifth Circuit upheld a death sentence where the Louisiana Supreme Court refused to review the question of whether an aggravating circumstance was supported by any evidence. The Louisiana Supreme Court held '"[i]f the jury finds more than one statutory aggravating circumstance and one

is clearly supported by the record, the sentence need not be overturned because one of the additional aggravating circumstances is not supported." 740 F.2d at 1344. See: Stringer v. State, 500 So.2d 928 (Miss. 1986); Irving v. State, 498 So.2d 305 (Miss. 1986) The Fifth Circuit, denying habeas relief held:

> Knighton argues that this position of the Louisiana Supreme Court is contrary to the eighth amendment, as elucidated in Furman v. Georgia and Gregg v. Georgia. We do no agree. In Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2746, 77 L.Ed.2d 235, 254 (1983), the Supreme Court observed that "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty." The Supreme Court of Louisiana, like its Georgia counterpart, examines the death penalty to assure that it is not excessive, La.C.Cr.P. art. 905.9. This review was deemed important and underscored in Zant v. Stephens.
>
> The Louisiana Supreme Court made its capital sentence review as prescribed, 436 So.2d at 1157-61, and upheld the conviction and sentence. We perceive no constitutional inadequacy in the application of Louisiana law in this instance. There is nothing in this record to support the charge that the jury acted arbitrarily or capriciously or without adequate guidance in its imposition of the death penalty.
>
> 740 F.2d at 1351-1352.

See: Rault v. Butler, 826 F.2d 299 (5th Cir. 1987), cert. denied, ___U.S.___, 108 S.Ct. 14 (1987): Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987), cert. denied, ___U.S.___, 108 S.Ct. 6 (1987); Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, ___U.S.___, 107 S.Ct. 3278, 97 L.Ed.2d 783 (1987); Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, ___U.S.___, 106 S.Ct. 2259, 93 L.Ed.2d 703 (1986); Alvorod v. Wainwright, 925 F.2d 1282 (11th Cir. 1984); Accord, Cartwright v. Maynard, 822 F.2d 1477, 1480 (10th cir. 1987); cert. granted

sub nom, Maynard v. Cartwright, ___U.S.___, 98 L.Ed.2d 645 (1988).

In light of Lowenfield, the only thing constitutionally required for the jury to impose the death penalty in Mississippi, as in Louisiana, is that a verdict of guilty of capital murder be returned and then the jury be allowed to consider mitigating circumstances. That occurred here when petitioner was convicted of the narrowly defined offense of murder of a peace officer. The jury was fully instructed as to the mitigating circumstances they could consider. The requirement of finding additional aggravating circumstances is purely a matter of state law. The fact that the jury found a state law aggravating circumstance that was later held to be invalid does not involve a federal right even when the jury was required to weigh the aggravating against the mitigating circum-

stances and determine that the aggravating outweighed the mitigating circumstances in this case. The Supreme Court of Mississippi in making its initial proportionality review did not consider the prior conviction in determining whether the sentence of death was proper in this case. Under Goode this is sufficient to overcome the jury's consideration of the later vacated conviction.

3. The Procedural Bar

We come finally to the issue of the procedural bar imposed by the Mississippi Supreme Court regarding raising the 1963 New York conviction. Much ado has been made about Respondent's reliance on Phillips v. State, 421 So.2d 476 (Miss. 1982), in the case at bar. Contrary to the position taken in the amicus brief of the Mississippi Public Defenders' Association, the Respondent did not make an argument based on Phillips at any time in this case.

This issue of the 1963 conviction was raised as a direct error in the original post-conviction pleading and as a question of whether or not petitioner was denied effective assistance of counsel. The direct claim was that the New York conviction must be presumed invalid. Petitioner further alleged that his trial and appellate counsel were ineffective for not having investigated into the facts surrounding the 1963 New York conviction and for not challenging this conviction prior to trial or on appeal. The response of the state was simply that the issue was procedurally barred for failure to raise the claim couched in those terms at trial or on direct appeal. There was no citation to Phillips in the State's responsive brief. Response to Petitioner's Application for Leave to File Motion for Post-Conviction Relief at 7. In the context

of the ineffective assistance of counsel claim the response was as follows:

> Finally petitioner raises the question of his 1963 conviction in New York for assault with intent to rape. As of this date the conviction still stands. A petition for writ of error coram nobis has been filed with the courts of New York attacking this conviction on the basis of the failure to grant an appeal and failure to give a proper hearing on the voluntariness of the confession petitioner gave at the time. Because the record of the trial has been destroyed or lost relief will probably be granted. This would do no harm to the conviction here as there are two other valid aggravating circumstances existing in this case that the jury found.

However the question is the failure to investigate concerning this earlier conviction. The truth of the matter is that such a conviction is presumed to be correct just as counsel stated in his affidavit. Although the crime was assault with intent to rape. At the sentencing hearing the trial judge stated:

> And here he is now, a rapist and that's what he is, attacked an innocent young lady who was on her way to work in the kitchen of one of our local hospitals.

> He is without question lazy, a liar and a rapist.
>
> Exhibit K to Motion, at page 2.
>
> Try as he may he cannot change what he was charged with and convicted. There was a trial with a jury and a conviction. Trial counsel was perfectly within sound trial practice to assume that a conviction that was 20 years old without a challenge was valid. Where is the prejudice as there are two other aggravating circumstances existing in this case.
>
> Respondent's State Post-Conviction Response at 34.

When the response of the state was filed the conviction was only under attack in New York and still presumed valid, however no argument was made on the basis on Phillips by the state. When the New York conviction was vacated, petitioner notified the Mississippi Supreme Court of this action on April 15, 1987. Thereafter on April 28, 1987, petitioner filed a supplemental brief before the court below. The decision in this case was handed down on May 27, 1987, without the state being given an opportunity to respond.

The state's argument for procedural bar, had we been invited to make one, would have been based on the rationale found in Gilliard v. State, 446 So.2d 590 (Miss. 1984) and Miss. Code Ann. §99-39-21 (Supp. 1984). The court below, in Gilliard, held:

> We resolve the question referred to in Minor, supra, and hold that a defendant at a criminal trial who has litigated matters of fact and law at the trial, and whose conviction has been affirmed, may not, through a writ of error coram nobis, present and litigate the question again, even though then framed and placed in a setting of federal constitutional questions.
>
> 446 So.2d at 592.

Section 99-39-21 reads, in part:

> (2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal theories which could have been raised under said factual issue; and any relief sought under this chapter upon said facts but upon different state or federal legal theories shall be

procedurally barred absent a showing of cause and actual prejudice.

. . .

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim of relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

Gilliard and the statute simply hold that one cannot raise a claim and litigate it unsuccessfully on one legal theory at trial or on direct appeal and then on post-conviction review change the legal theory or basis for challenge.

Under Mississippi law petitioner could not meet the "cause" prong to overcome the procedural bar because he cannot demonstrate that the "legal foundation upon which the

claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal."

The Court below did not use Phillips as a procedural bar case. The discussion of Phillips was under the section of the opinion dealing with how a vacated sentence used as an aggravating circumstance would be treated on post-conviction review. This is not contrary to the direct appeal decision in Nixon v. State, ___ So.2d___, No. DP-65 (Miss. 1987) [See Appendix A to Amicus Brief of the Mississippi Public Defenders Association]. It must be noted that Nixon raised questions as to the facial validity of his prior conviction on direct appeal. This was not done in the case at bar. Here, petitioner's arguments were based on the theory that the prior conviction was not a proper aggravating circumstance because it did not "channel the jury's discretion by

'clear and objective standards,' and because it was too remote." 511 So.2d at 1336, 447 So.2d 218-19. Clearly the problems with the New York conviction existed at the time of the trial and direct appeal of this case. Petitioner did not assert them then and even requested and was given an instruction on the remoteness in time of the conviction being a mitigating factor. 477 So.2d at 219.

The discussion of Phillips by the court below was not in relation to the procedural bar; it related to how the vacation of a conviction, used as an aggravating circumstance in a death penalty case, would be treated and why the treatment was different than that given a prior conviction used to ...ance punishment under the habitual offender provisions of Mississippi law. The decision in Nixon is no different. In

Nixon, the Court rejected the defendant's argument that if the Court found the introduction of his prior rape conviction improper that they must reverse the death sentence. [Miss. Public Defender's Brief at A-5.] The court based its rejection on the prior opinions in Stringer v. State, 500 So.2d 928 (Miss. 1986) and Irving v. State, 498 So.2d 305 (Miss. 1986).

The procedural bar holding by the Mississippi Supreme court in this case is not based on Phillips, but is based on the ruling in Evans v. State, 485 So.2d 276 (Miss. 1986), cert denied, ___U.S.___, 90 L.Ed.2d 994 (1986). There the petitioner did not raise a claim of improper jury selection until more than four years after the conviction was imposed and where at least three different sets of counsel had worked on the case. The court held the claim to be barred. The scenario is

basically the same here. Petitioner did nothing in regard to his New York conviction from the time of his indictment in January, 1982 until August, 1986, when the post-conviction proceeding was filed in New York. During this time petitioner was represented by three different sets of attorneys. It is clear that the procedural bars set forth in Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983) as applied in Johnson v. Thigpen, 633 F.Supp. 1121 (S.D.Miss. 1985) and Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, __U.S.__, 94 L.Ed.2d 802 (1987), are applicable in this case. Petitioner was convicted in 1982; however, his assignment of errors and brief on direct appeal were not filed until February 14, 1984, long after the March, 1983 of the Edwards opinion. Under the facts of this case, Wheat v. Thigpen, 793

F.2d 621 (5th Cir. 1986), cited by petitioner, is not applicable.

After his conviction, petitioner did not, in any timely fashion, attempt to have the New York conviction overturned. He waited for more than two years before instigating any post-conviction proceedings in New York. Clearly under the rationale of Evans he is barred from raising this claim at this time. We are dealing here with a different procedural bar and it is not inconsistent with the decision in Phillips.

The Mississippi Supreme Court clearly invoked a valid procedural bar to the consideration of this issue and this Court has stated that it will enforce the clear invocation of a state law based procedural bar. Caldwell v. Mississippi, 472 U.S. 320 (1985).

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court denying petitioner's motion for post-conviction relief should be affirmed.

Dated: Jackson, Mississippi
March 26, 1988

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief for Respondents to the following:

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This the 26th day of March, 1988.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.